No. 10258

In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Appellant

vs.

RETA D. MILLER and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian,
Appellees

Upon Appeal from the District Court of the United States for the District of Oregon

Hon. Claude McColloch, Judge

Petition of Appellant for Rehearing

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Comes now the appellant and petitions the Court to grant a rehearing in the above entitled cause.

This petition is based upon the following grounds:

I.

Error of the Court in holding that the action of appellant in holding the dishonored check at its Portland branch office for a day before returning it to the insured furnished a sufficient rational basis for the jury's verdict.

It appears from a study of the majority opinion that the basis for the decision is that appellant held the dishonored check in the Portland office for one day before returning it to the maker and that "no explanation was offered for this delay." This view as to the basis of the majority opinion is borne out by the dissenting opinion of Justice Haney.

Appellant respectfully submits that the majority opinion on this point is in error in two vital particulars:

(1) It apparently holds that the incident of holding the check overnight bears on the question of whether appellant had previously agreed to accept the check unconditionally. We contend it has no probative value on this question because it occurred *after* any alleged agreement could have been made. On the record the rights of the parties were fixed when the check was dishonored at the McMinnville bank—not when the dishonored check was returned to Portland—not when the Portland branch office returned the same by mail to the insured.

(2) The Court is in error in holding that the appellant's alleged unexplained "delay" in keeping the dishonored check overnight furnished a rational basis for the verdict. It is appellant's earnest contention that if there were any requirement for the prompt return of the dishonored check to insured, certainly this was complied with when the check was mailed during the next business day after the receipt thereof; that appellant was entitled to a reasonable time for getting the check through its Portland office and into the mail to insured. There was no delay and therefore no explanation by appellant was required.

Under Section 69-1003, O.C.L.A. a check must be presented for payment within a reasonable time after it is issued or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. It would seem that this Court should not hold that the payee of a dishonored check owes to the maker a greater obligation for its prompt return than he owes to the maker of a good check for its prompt presentation. The rule in Oregon with respect to a reasonable time under Section 69-1003 O.C.L.A. is that a check should be presented, where drawee and payee are in the same place, at some time before the close of banking hours on the day after it is received by the payee. Loland vs. Nelson, 139 Ore., 581, 584; 8 Pac. 2nd, 82. Williston on Contracts (Revised Edition), Sec. 1209, p. 3470,

states: "and if the drawee bank is not in the same place the check must be sent for collection on the day following receipt."

In this case the dishonored check was returned to appellant on Monday, November 25, and on November 26 the cashier sent it by registered mail to the insured at McMinnville, Oregon (plaintiff's Exhibit 3, Tr. p. 117). This action therefore was taken within the same time that is required for the presentation of a good check. As this Court knows, the business of a life insurance company must be transacted meticulously and with a full written record evidencing each transaction. The Court recognizes that the Portland agency of appellant was an important state office. The record shows, as the minority opinion indicates, that there was a large volume of business transacted in this office. We believe it will be conceded that all transactions involving the receipt of checks, the deposit thereof, the reversing of entries in the event of dishonor and the return of dishonored checks must be carefully recorded. This was done in the present case. (See defendant's Exhibits 21, 10, 11, 12, 15, 22 and plaintiff's Exhibits 3, 3a; Tr. pp. 200, 182, 183, 185, 196, 201, 117, 122). The Court must know that such procedure is followed by business concerns generally because checks are universally used. Certainly this Court should not go on record with a decision, the effect of which will be to place every business

concern in a position where it must, in the event a check is dishonored, immediately cease its routine business procedure, go to the maker of the check, give him an opportunity to correct a situation which has arisen through his own act or omission and through no act of the payee, and in the meantime hold open to the party at fault all his former rights and privileges. Business cannot be conducted in this way. If the rule announced by the Court is to stand business concerns cannot, in cases where the time element is important, accept or handle personal checks under any conditions.

II.

Error of the Court in holding that there was substantial evidence in the case to support the finding of the jury that the check was given and received as unconditional payment of the premiums.

The only incidents mentioned in the Court's opinion, other than the holding of the check overnight (discussed above) are analyzed below and we respectfully submit that none constitutes evidence worthy of submission to a jury.

(1) The Court indicated that the giving of the check by the insured was evidence of his intention to become bound. We think this was evidence of an intention to pay the premiums and nothing more. But always the

presumption is that the check is given conditionally. As stated in Central States Life Insurance Co. vs. Johnson, 181 Okla. 367; 73 Pac. 2nd, 1152, 1154,

> "A check is never presumed to constitute payment of obligation. The presumption is that it is accepted only conditionally upon its due payment. See 48 C. J., 703. The burden is upon the one charging unconditional acceptance to show such acceptance."

The Court, we believe, recognizes this rule. There is nothing in the evidence which takes the case out of the ordinary check transaction as far as the insured is concerned.

(2) The retention of the check by the Portland office from the time it received the same until it deposited it on November 18 is not evidence of an agreement of unconditional acceptance. Here again the presumption is that the check was received conditionally to be deposited before the expiration of the grace period. The Court states that on account of the postdating there was implied notice that there was insufficient money presently on deposit. The implied notice, we submit, was that there would be funds on deposit on the date of the check, or the first banking day thereafter, which was within the grace period. May we emphasize that this is not a transaction in which a check was taken to be held beyond the grace period nor a transaction in

which a check was actually held beyond the grace period. The grace period in this case, although by counting days ended on November 17, actually continued through the next day for the reason the 17th was Sunday, a legal holiday. This is the well established rule.

Penn Mut. Life Ins. Co. vs. Miller (C.C.A. 2nd) 16 Fed. 2nd, 13.

Lightner vs. Prudential Ins.Co., 97 Kans. 97; 154 Pac., 227.

Bohles vs. Prudential Ins. Co., 84 N.J. Law 315; 86 Atlantic 438

Penrose vs. Metropolitan Life Ins. Co., 269 N.Y.S., 764

Linfors vs. Unity Life Ins. Co. (S.C.) 1 S. E. 2nd, 781.

We submit that this court should not allow to stand as its considered and final opinion the holding that the payee of a check, which obviously is not given to secure extension of time or credit, is deemed to have accepted the same as unconditional payment merely by holding it for deposit on its date.

(3) The retention of the post office money order at the Portland office for a few days before the same was returned, furnished no rational basis for the jury's verdict. We are concerned here with the question as to evidence of an agreement between the parties. The post office money order incident occurred after the policy had lapsed and long after the rights of the parties had been fixed. The company had already definitely taken the position that the policy had lapsed and that evidence of insurability must be submitted before the policy could be reinstated. Possibly the money order was held pending receipt of evidence of insurability. Certainly nothing in this incident had any bearing whatsoever upon the question of what the parties had agreed in the first place with respect to conditional or unconditional payment of the premiums.

Appellant presented in this appeal specification of error 5 based upon the admission in evidence of the post office money order; plaintiff's Exhibit 8c, Tr. 127 (Appellant's Brief, p. 22). Appellant contended that this exhibit was not competent or relevant. We think that the specification was well taken and merited consideration. In the oral argument the Court suggested that perhaps appellant was not injured by the admission of this Exhibit even though incompetent. We firmly believe that this evidence was incompetent and

irrelevant, that it was prejudicial in the jury trial and that it has apparently influenced and misled the appellate Court into a wrong conclusion.

We hardly need call attention to the rule now firmly established by the Oregon Supreme Court and generally followed in the Federal courts to the effect that in order for a case to be submitted to the jury there must be substantial evidence on all of the material issues.

State Savings & Loan Association vs. Bryant, 159 Ore., 601, 626; 81 Pac. 2nd, 116

Fink vs. Prudential Insurance Co., 162 Ore., 37, 60; 90 Pac. 2nd, 762

Simkins Federal Practice, 3rd Ed., Sec. 626, p. 472

Penn R. Co. vs. Chamberlain, 288 U. S., 333, 343; 77 Law Ed., 819, 824.

Appellant has contended throughout this case that the giving of a check is not absolute payment unless the parties so agree and that proof of such agreement must be clear and satisfactory. This is the doctrine announced

by the Oregon Supreme Court in Joppa vs. Clark Commission Co., 132 Ore., 21, 28; 281 Pac., 834, in which it is stated:

> "The mutual intention of the parties that a check shall be given and received as payment may be established by proof either of an express contract or a contract implied in fact, but in either case it must be proved by clear and satisfactory evidence."

Regardless of whether the agreement must be expressed or implied, certainly the evidence thereof must be substantial—it must be more than a mere scintilla. It is our contention that in this case there is no evidence of such an agreement, express or implied, and that the submission of the case to the jury placed the latter in a position where it had to speculate and guess at the result.

III.

Error of the Court in basing its decision on John Hancock Mutual Life Insurance Company vs. Mann, 86 Fed. 2nd, 783.

The Court apparently holds that the doctrine of the *Hancock case* is applicable to the instant case. We think the Court has failed to see that the facts in that case are

distinctly different from the facts in the present case. The appellant discussed the case in its Reply Brief, pages 6 and 7. The case is not in point because the check in the instant case was not dated after the expiration of the grace period; because there is a limitation of authority in the policies in the instant case not present in that case; and because there was no conduct in the instant case indicating an acceptance of the check as unconditional payment. On the contrary, the conditions contained in the official receipts clearly stated that the check was accepted as conditional payment only. It will be noticed that the opinion in the *Hancock case* clearly states in italicized type:

> The *date therein fixed* (in post dated check) *extended beyond the payment date of the premium and the thirty days grace.*

Furthermore, the Court apparently has failed to see the real force and significance of the clear-cut expressions in the several cases cited in appellant's opening brief holding not only that checks given for the payment of life insurance premiums are conditional payments but also that the burden is upon the person claiming that the check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence (Appellant's Brief, pages 28-30).

Appellant prays that these cases be given the weight and consideration to which they are entitled and that the Court also give effect to the issuing by the defendant company of the conditional receipts and the mailing of them to the insured on November 18 (Tr. pp.38, 182, 183).

IV.

Error of the Court in apparently allowing its decision to be affected by questions of waiver and estoppel, the elements of which are not in the case.

The Court apparently thinks that the defendant company should be held responsible because the insured suffered an unfortunate accident after the date of the dishonor of the check and before he had an opportunity to determine whether or not he desired to reinstate. Certainly the company was not responsible for the non-payment of the check. It was this non-payment which caused the policy to lapse. We claim it is mere speculation to say what insured might have done toward reinstating the policies or either of them if he had received his mail on November 27 before his injury or if he had not been injured on that day. He, and he alone, had the right to elect either to allow the policies to

remain lapsed or to apply for reinstatement as provided in the reinstatement clauses.

Appellant requests the Court to consider the opinion in Security Trust Co. vs. Mutual Life Insurance Co. (District Court E. D. Ky.) 48 Fed. Supp. 779. The decision was not published until after the oral argument in this case. In that case the quarter-annual premiums were payable May 30 with a provision for a grace period of 31 days thereafter. This period was extended by written agreement to July 31. On July 30 checks were delivered to the company for the premiums. They were presented to the bank, payment was refused and the checks were returned; after communicating with the insured the checks were again presented and payment again refused, just prior to the day on which insured was found dead, August 5. The Court held that the presentation of the checks to the bank a second time amounted to nothing more than an act of grace or indulgence affording the insured an opportunity to fulfill the condition upon which the checks, if paid, were to be treated as timely payment of the premiums and that such an act of indulgence did not abrogate the conditions upon which the checks had been accepted nor imply recognition of them as evidence of subsisting indebtedness so as to constitute a waiver of forfeiture

in the event they were not paid. The Court then states (48 Fed. Supp. 779, 783):

> "After having twice declined to pay the checks during the life of Mr. Gault, the effort of the plaintiff to save the situation by tendering payments after it discovered that he was dead, contributed nothing to the restoration of plaintiff's rights under the policies. It was like trying to place a bet on the winner after the race was run.
>
> "(6) 'Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default.' Thompson vs. Insurance Company, 104 U. S. 252, 260; 26 L. Ed. 765."

It is appellant's contention that there are no acts of waiver or estoppel in this case; and that, as stated in the minority opinion, the intention of the insurance company that the check was conditional payment only is absolutely clear throughout the entire record.

We believe the Court has grievously erred in holding the company liable on account of matters which occurred after the policy had lapsed and which we earnestly believe had nothing at all to do with the one and only issue in the case: Had the premiums been paid at the time of the death of insured? Such premiums had not been paid and the company had in no way represented

or advised the insured or anyone else that they had been paid. In fact, it had expressly advised that they were not paid and that the policies had lapsed.

We respectfully submit that the present decision should not be allowed to stand as the final opinion of the Court; that in fairness to appellant and to other insurance companies and business concerns doing business within the jurisdiction of this Court further consideration should be given to the points discussed herein and to the matters so well and forcibly set forth in the dissenting opinion; that for this purpose rehearing should be granted.

Respectfully submitted,

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I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

W. M. Huntington,
Of Attorneys for Appellant.